



State of Vermont
Public Service Board

MEMORANDUM

To: Parties to PSB Docket No. 7466 and EEU E-mail Service List

From: Judith C. Whitney, Deputy Clerk of the Board *JCW*

Re: Vermont Energy Investment Corporation Subcontractor Agreements

Date: February 5, 2010

Since 2000, Vermont Energy Investment Corporation ("VEIC") has been serving as the statewide Energy Efficiency Utility ("EEU") under contract to the Public Service Board ("Board").¹

On October 29, 1999, the Board issued a Request for Proposals to solicit responses from entities interested in providing the energy efficiency services in Vermont.² The initial contract was awarded to VEIC, and the EEU began operation in March of 2000. VEIC's contract was renewed in 2003. On April 27, 2005, the Board issued a second Request for Proposals for the EEU services to begin in 2006. VEIC was again awarded the contract; it was renewed for an additional three years in 2009.

VEIC's contract with the Board does not require that VEIC obtain prior approval of its subcontract agreements. However, VEIC recently asked Board staff to review a subcontract related to ISO-New England's Forward Capacity Market before VEIC entered into the agreement. In the course of this review, Board staff informed the Board of the inclusion of a "Non-Compete" clause. Under this clause, the subcontractor agrees "not to directly or indirectly compete with VEIC within the State of Vermont in any manner

¹The City of Burlington Electric Department provides energy efficiency services to its customers in its service territory.

²Although the Request for Proposals was designed to solicit a single entity to provide all EEU services throughout the State, other than in BED's service territory, the Board has the discretion to choose multiple service providers according to demonstrated expertise, by geographic area, or on any other appropriate basis. See the Board's Order in Docket 7466 dated November 24, 2009, for more information.

related to the EEU during the period of the Prime Contract and any extension thereof." (See Attachment 1 for the specific language.³)

VEIC's Director of Administration confirmed in a telephone call with Board staff that the clause has been included in VEIC's subcontracts since the EEU first began operation in 2000.

The Board is concerned about the potential impact of the "Non-Compete" clause on the competitive environment for energy service providers within the State of Vermont, both currently and since the inception of the EEU in 2000. The Board is seeking comments from interested persons on this issue.

The Board is also seeking comments from the parties to Docket 7466⁴ on the implications, if any, of the "Non-Compete" clause on the issues in this docket, including the issues addressed in the Board's Order of November 24, 2009.

The comment deadline is Wednesday, February 17, 2010. Reply comments are due by Wednesday, February, 24, 2010. All comments filed on this issue will be posted to the Board's web site for Docket 7466 (<http://psb.vermont.gov/docketsandprojects/eeu/7466>).

Encl. (1)

³"Prime Contract" refers to VEIC's contract with the State of Vermont.

⁴In its November 24 Order, the Board altered the structure model of the EEU from a contract-based model to an Order of Appointment model as authorized by 30 V.S.A. § 209(d)(5).

32. NO GIFTS OR GRATUITIES

Subcontractor, its employees, agents or subcontractor(s) shall not give title or possession of any thing of substantial value (including property, currency, travel and/or education programs) to any officer or employee of *VEIC*, the *State*, the *Contract Administrator* or the *Fiscal Agent* during the term of this *Subcontract*.

33. NON-COMPETE

For good and valuable consideration and as an inducement for *VEIC* to subcontract with *Subcontractor*, *Subcontractor* agrees not to directly or indirectly compete with *VEIC* within the State of Vermont in any manner related to the *EEU* during the period of the *Prime Contract* and any extensions thereof.

The term "not compete" as used herein shall mean that *Subcontractor* shall not:

- 1) bid against *VEIC* on any project related to the *EEU*, including but not limited to, any Vermont electric utility's Distributed Utility Planning initiatives; or
- 2) own, manage, operate, or consult to any Vermont business substantially similar to or competitive with the business activities conducted by the *VEIC* or any of *VEIC*'s subcontractors in carrying out the rights, duties or obligations of the *EEU*.

Subcontractor acknowledges that *VEIC* shall or may in reliance on this agreement provide *Subcontractor* access to trade secrets, customer-specific information, competitively sensitive information, aggregated data, and other confidential data and good will. *Subcontractor* agrees to retain said information as confidential and not to use said information on his or her own behalf or disclose same to any third party. *Subcontractor* also agrees to abide by the other provisions regarding confidentiality contained herein and any other confidentiality related guidelines or directives that *VEIC* may promulgate from time to time.

This agreement not to compete shall be binding upon and inure to the benefit of the parties, their successors, assigns, and personal representatives.

34. FAIR EMPLOYMENT PRACTICES AND AMERICAN DISABILITIES ACT

Subcontractor shall comply with the requirements of Title 21, V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices, to the full extent applicable. *Subcontractor* shall also ensure, to the full extent required by the Americans With Disabilities Act of 1990, that qualified individuals with disabilities receive equitable access to the services, programs, and activities provided by the *Subcontractor* under this *Subcontract*. *Subcontractor* further agrees to include this provision in all of its subcontracts.

35. FORCE MAJEURE

Either party's performance of any part of this *Subcontract* shall be excused to the extent that it is hindered, delayed or otherwise made impractical by reason of flood, riot, fire, explosion, war,